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DECISIONS ON HINDU LAW DURING 1910.

We attempt in this short note to trace the growth of Hindu law during the year 1910. We shall first take the subject of adoption. The case of *Adivi Surya narayana Nidamurty* reported in 33 M. 228 strikes us at once. To understand the case the facts are these. A died leaving a son B and a widow C. The son subsequently died leaving a widow D. B also died. Then C, the widow of A adopted a boy to her husband under the authority given by her husband. The question arose whether such an adoption is valid in law. Their Lordships held that the adoption was invalid because the power to adopt was at an end, when the estate vested in the widow of her son. The decision merely confirms the well-known principle of law laid down in *Bhooban Mayee* v. *Ram Kishore Acharja*, *viz*, that when the estate of a Hindu vests in an heir other than a widow the power to adopt given to her by her husband is at an end and the power is not revived even though the estate vests subsequently in the widow. It seems to us that the last proposition that the power is not resuscitated by a subsequent vesting of the estate in her is merely a logical corollary to the theory of the power being exhausted. (*Ramakrishna* v. *Sa ma Rau* 26 Bom. 526 (F. B.) *Manikyambala Bose* v. *Nanda Kumari Bose* 33 *Cal.* 1306.

The cases cited above, go further and say that even with the consent of the last holder of the estate, the widow with the power to adopt and on whom the estate subsequently devolves, cannot make a valid adoption. Justice Miller throws doubt over the last proposition by saying "that if the only obstacle to the divesting of D's estate is the fact that it had vested in her and was not in C at the time of the adoption, *the power to adopt being still alive*, I find some difficulty in seeing why the obstacle should not be removable by consent." There lurks one fallacy in the learned Judge's view of the law, for his Lordship proceeds on the hypothesis that the *power to adopt is still alive.* The theory of the power being still alive sounds perfect sense and such a proposition would have been in consonance with the needs and wishes of the Hindus. The whole mischief is done by importing the technical law of powers into the Hindu law of adoption and the result is the peculiar proposition of law laid down in *Bhooban Moyee's* case and confirmed in *Padma Kumari's* case, a proposition of law from which it is impossible to recede at this late hour.

The next case is that of *Rup Narain* v. *Musamut Gopal Devi* (19 M. L. J. 548 at 561) where the question arose as to the validity of the adoption of a daughters 'son. Their Lordships of the Judicial Committee say 'that the general rule of Hindu law cannot be disputed but it may be varied by *family custom* and often is so varied in the province from which this appea

comes." If their Lordships suggest by this that the adoption of a daughter's son can be made valid only by proof of a family custom, we must say at once that it is narrowing too much the province of custom and if the view is to be accepted a number of decisions founded on custom prevailing in the south of Madras validating such an adoption must be upset. But this narrow view of customary law their Lordships do not suggest for they are only concerned with a case from the Punjab where " it (law of adoption regarding daughter's son) is often so varied in the province from which this appeal comes." So that the case calls for no adverse comment except by way of removing any possible misapprehension of the basis on which it rests.

Passing on to the subject of marriage the only case of any importance is *Muthuswami Mudaliar* v. *Masilamany* reported in 20 M. L. J. 49. This case is chiefly interesting as it contains a judicial recognition of the principle that according to Hindu Law, persons following other religions may by conversion become Hindus and acquire all the rights of Hindus. The facts of this case are these :—The 1st defendant in this case who was born of Christian parents was married to her deceased husband who belonged to a weaver community of the Sudra caste. The findings are that the woman became a Hindu before she was married and that the community to which the husband belonged treated the marriage as valid. The question arose whether the marriage is valid. Justice Sankaran Nair decides in favour of its validity and bases the judgment on three grounds (1) Custom (2) General Hindu Law and (3) Recognition by the community as valid.

Taking the second of these reasons, we have to observe that the learned Judge argues thus:—All Hindus are divided into four castes ; all those Hindus who do not belong to the three higher classes belong to the fourth or the Sudra caste ; marriages between two subjects of the same caste are valid; in this case both the parties belonging to the same Sudra caste, their marriage is valid according to general Hindu Law. Now this assumes that the 1st defendant was a Hindu and that the Hindu religion is a proseletysing religion. Here we may point out the difference between *Patitas* or out-castes being admitted into caste, and the followers of other religions being converted into Hindus, The *patitas*, apart from those who become converts to another religion, are still Hindus though they do not belong to the same caste to which they belonged; in some cases, they can be and are generally readmitted into the very caste to which they belonged before on the performance of some purificatory ceremonies; in fact, they are restored to all the privileges they had before. The case of the followers of other religions becoming Hindus is different and several questions crop up here which are not easy of solution. One might start with the question whether according to Hindu Sastras, there can be converts to Hindu Religion ; again are any and what *prayaschithams* necessary for conversion to Hindu Religion—to what caste would the convert belong—or is he at liberty to claim to be attached to any of the three higher castes or whether caste system is binding on him at all; these are some of the questions which strike one on perusing the judgment. These questions admit of con-

siderable discussion and in this short article, it is not possible to discuss them.

Turning to grounds Nos. 1 and 3 we have to note that if the question had been decided on these grounds alone, the matter would have been different for as the learned Judge observes custom overrides every rule of law and where the community has accepted marriage as valid, it would be an unjustifiable interference on the part of the Courts to declare such marriages invalid. Only, one is tempted to ask 'is there any limit to the operation of this custom'? There are the vague limitations that it should not be opposed to public policy and that it should not be illegal or immoral. The Muhammadan law for example allows custom to override only some of its rules, and no custom would validate the marriage of a fifth wife. Are there any such limitations in Hindu Law? And as every other religion has, has Hindu religion, no fundamental rules which the Hindu Law will not allow to be abrogated by custom which, it may be noted may not have the ordinary disqualifying characteristics.

As regards the other aspect of the operation of custom, the learned Judge observes "But if the marriage is valid according to ordinary Hindu Law, its validity is not affected by its being opposed to the rules of the caste or the community to which the parties belong" *i.e.* "What is not valid according to ordinary Hindu Law, custom subject to certain limitations, can validate; but what is valid according to Hindu Law, custom cannot affect at all." This is the argument relied upon by the learned Judge in coming to the conclusion "that marriages between members of different sub-sects of the same caste which is to be determined according to the rule mentioned before that all Hindus who do not belong to the first three classes are members of the same Sudra caste, are valid according to general Hindu Law." And this is so even if the rules of the caste or community prohibit such marrages.

Let us take the case of two subsects which according to the rule laid down above belong to Sudra caste: There are several sub-sects which differ very largely in civilization; there are sub-sects, the members of one of which are not touched without pollution by members of the other and are not allowed to enter the latter's houses. These sub-sects have for several ages past, been treating the marriage of one of their own with another of a lower sub-sect as utterly invalid; in fact such a person was excommunicated by the community. Are such marriages valid; and have the issue all the rights of children born of Hindu parents according to Hindu law? Can these inherit to the father's relatives in the community? If the proposition laid down above is to be accepted without reserve, it would be so; and this would be certainly going farther than Freedom of Religion Act, which saves the rights of the outcaste only. To declare such marriages valid in the face of long prevailing custom to the contrary would be startling. And after all, whence this restriction on the operation of custom and what is the 'general Hindu Law' which is spoken of here? Here we may point out that all that is contained in Manu and other smrithi writers is not good law now. Several rules laid down there have been by subsequent writers declared to be no longer law for various reasons, notably, requirements of a changing society. Another way in which Hindu Law was modified was by allow-

ing custom to change it in every direction ; the only thing that is considered is the moral consensus of the community. As one writer has remarked, the society adopting different rules to suit its changed conditions is one silent way of abrogating old rules which have fallen into disuse as not satisfying the moral ravings of the community.

Some, in fact, complain that the advent of the British has put an end to this silent progress of Hindu Law and has stereotyped it. If this is so, and if for several centuries even prior to the advent of the British, marriages such as spoken of above, have been consistently treated as invalid and the parties outcasted as not being in the best interests of the community, why should the courts disregard all this and give effect to certain old texts which have long fallen into disuse. We have also to remember that strict Hindu Law with all its details should according to the best authorities be cautiously applied to the tribes of Southern India which form the bulk of the so-called Sudra caste, and that according to some it is more as a matter of equity and good conscience than anything else that the rules of Hindu Law are applied. If the Hindu Law is to be applied caution which means that the rules of these communities are to be paid due attention then why force upon them something which is repugnant to them? If equity and good conscience are followed, then also, the wishes of the community should be respected. One fails to see why, as a matter of Hindu Law, their long standing customs should be set at nought so as to be in conformity with certain rules which, even if they had once been accepted have long been rejected as unsuitable.

You may pass new laws and say that such marriages are valid, providing for the effect of the validity of such marriages upon rights of inheritance, etc. But to declare as a matter of Hindu Law that such marriages are valid in spite of long standing customs to the contrary is what we object to. We must confess that we feel considerable hesitation in accepting the two propositions of law laid down by the learned Judge regarding the operation of customs without some limitations the nature of which we have tried to indicate as briefly as is possible in a short article.

(*To be continued.*)

SYNOPSIS OF CASE-LAW.

Wallis & Son & Wells

v.

Pratty & Haynes.

[1911] A.C. 394.

The respondent sold seed to the appellant as 'common English *sainforin*' on the condition "that sellers give no warranty expressed or implied as to growth, description or any other matters." The seed delivered to the appellants was not common English 'sainforin' but, in sainforin, a different and inferior seed and resold it as such to other parties, to whom the appellants were obliged to pay damages for the mistake. Held that the appellants were entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants have been obliged to pay to the other parties.

Loreburn L C.—If a man agrees to sell something of a particular description he cannot require the buyer to take something of a different description, and a sale of goods implies a condition that the goods

shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as a breach of warranty, *i. e.*, to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality was converted into a warranty.

Warranty is defined in the English sale of Goods Act as "an agreement with reference to goods which are the subject of a contract of sale, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated." [Compare Ss. 113, 117 and 118 I. C. A.]

Wyatt v. *Attorney-General of Quebec.*

1911 A. C. 489.

The appellants were grantees of lands on both sides of a river which was shewn by the evidence to be navigable and floatable at such locality and from thence to its mouth :—*held*, that the right of fishing in the river vested exclusively in the crown and that as the letters patent to the appellants in 1883 granting the said lands were plain and unambiguous in their terms and did not specifically grant rights of fishing in the river opposite thereto, the patentees could not claim such rights as enlarging the terms of the grant or by reason of such rights having been exercised by them continuously from the date of the patents without interference.

John D. Hope and Co.

v.

Glendining.

[1911] A. C.

Bankers and brokers have a general lien on securities in their hands as between themselves and their customers for the balance due from these customers on account between them. This rule applies even where such agent contracts for an undisclosed principal and it is not contingent on the principal's making default. Documents in connection with a transaction which is closed can be retained in, respect of a liability arising out of a subsequent transaction. (Compare S. 171 Indian Contract Act.)

THE WEEKS CASES.

16th October, 1911.

Crl. Mis. Petition No. 313 of 1911.

Sundara Iyer J. and Spencer, J.

Even though a magistrate is not biassed against an accused yet if his acts have created in his mind an apprehension not unreasonable that he will not have a fair impartial trial, a transfer is desirable.

17th October 1911.

Abdur Rahim J. and Phillips, J.

C. M. S.A. 1 of 1910.

Any matter arising between rival decree-holders in execution does not come within sec. 47 (C. P. C. 1908) and there-ore any order passed as between them is not a decree and as such appealable.

18th October, 1911.

SECOND APPEALS 180 and 817 of 1910.

Benson J. and Abdur Rahim, J.

It is settled law that a decree obtained against a person who is really the manager of a family for a binding debt is binding upon the other members of the family. The mere fact that he is not described as the managing member does not make it the less binding.

SECOND APPEAL 468 of 1910.

The consent given by a deceased son to his mother to adopt to her husband is not a valid consent in law.

20th October, 1911.

O. S. Appeal 31 and 32 of 1911.

Sundara Iyer J. and Spencer, J.

A Hindu father sought for the delivery of his minor daughter aged 5 by his first wife from the defendants who were the maternal graındfather and maternal grand-mother respectively of the minor. Mr. Justice Bakewell ordered the delivery of the minor girl to the petitioner on the ground that he was in law entitled to the same. On appeal it was held that the chief thing to be considered by the court in such cases is what is best to be done in the interests of the minor. Though the minor's father had a better legal right to the custody of the minor their lordships held that that was not the sole considera-tion to weigh with the court in disposing of such cases. In the present case consider-ing that the petitioner (father) subsequent to the death of the minor's mother had married a second wife and had prior to the death of the minor's mother charged her along with the defendants with theft and that the maternal grandfather and grandmother had made valuable gifts of certain property to the minor's mother which was inherited by the minor and that the minor's interests required that she should be brought up by the mater-nal grandfather and maternal grand-mother, the Court considered that the present was not a case where the girl ought to be directed to be delivered to her father.

SECOND APPEAL No. 499 of 1910.

A sale in favour of a minor arranged for by a friend of the minor is not void and is effective to pass property.